IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

NATIONAL HOMEOPATHIC HOSPITAL ASSOCIATION OF THE DISTRICT OF COLUMBIA, a corporation, and AETNA CASUALTY AND SURETY COMPANY, a corporation, *Petitioners*,

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, *Respondent*.

BRIEF IN SUPPORT OF PETITION.

SECTIONS OF COMPENSATION ACT INVOLVED.

Section 908 (f) of the Compensation Law (Title 33 Sec. 908 (f) U. S. C. A.; 44 Stat. 1424), which reads as follows:

> "Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: Provided, however, That in addition to compensation for such permanent partial disability, and after the

cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44."

Section 944 (a) (c) (1) (2) of the Compensation Law (Title 33 Sec. 944 (a) (c) (1) (2), U. S. C. A.; 44 Stat. 1424) which read as follows:

(a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of the Act. Such fund shall be administered by the Commission. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(c) Payments in such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

Section 902 (2) of the Compensation Law, (Title 33, Sec. 902 (2) U. S. C. A.; 44 Stat. 1424) which reads as follows:

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person

directed against an employee because of his employment."

Section 902 (10) of the Compensation Law, (Title 33, Sec. 902 (10) U. S. C. A.; 44 Stat. 1424) which reads as follows:

> "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Section 921 (b) of the Compensation Law, (Title 33, Sec. 921 (b) U. S. C. A.; 44 Stat. 1424) which reads as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District) * * * "

ARGUMENT.

It was the contention of the petitioners in the complaint filed in the District Court of the United States for the District of Columbia (R-5 to 7) that the Deputy Commissioner should have rated this case under section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act, effective in the District of Columbia; that he should have rated the extent of the permanent partial disability to the right leg caused by the injury of January 19, 1942, and rated the percentage of permanent disability to the right leg caused by the injury of July 8th, 1942, and held the employer and insurance carrier only liable for the percentage of disability caused by the injury of July 8th, 1942 under said above mentioned provision of the act. It was also contended in this complaint that if the deputy commis-

sioner desired to rate the claimant as being totally and permanently disabled he should have rated the extent of the claimant's disability from the injury of July 8th, 1942 in relation to the full use of his right leg and charged the employer and insurance carrier with the disability only to the right leg in accordance with said section 908 (f) of the Act in question, and if he was then of the opinion that as a result of all of the injuries this claimant received he had a permanent total disability, then the difference between the extent of the disability to the right leg received as a result of the injury of July 8th, 1942 should only be charged to the employer and insurance carrier, and the difference between that percentage of disability and the permanent total disability should be charged to the special fund established under section 944 of the said Act.

It is clear from a reading of section 944 (c) (1) that 50 per cent of the funds collected under section 944 of the Act shall be available for payments under section 908 (f) of the Act. The balance of the funds collected under the provisions of section 944 were to be used under the provisions of section 908 (g) of the Act in question.

It was alleged in said bill of complaint that the findings of fact of the deputy commissioner (R. 9, 10) that the injuries received by this claimant prior to July 8th, 1942 "were not industrial injuries and are not previous disabilities within the meaning of section 908 (f) of the Act" was not a correct statement of the law as set forth in said section 908 (f) of the Act, but was an interpretation read into the Act by the deputy commissioner. It was therefore contended that the deputy commissioner's decision was not in accordance with law and that therefore relief should be granted to restrain the enforcement of the compensation order in whole or in part. It was contended before the United States Court of Appeals for the District of Columbia that the deputy commissioner in order to reach the conclusion which was set forth in his findings of fact had to read into section 908 (f) of the Act in question

certain words which were not there. He had to read into section 908 (f), before the word "injury" in the second line the word "industrial", and between the words "previous disability" in the fourth line he had to insert the word "compensable", and that based upon this line of reasoning he held that section 908 (f) of the Act did not apply. We contended that the deputy commissioner by his findings of fact changed the wording of section 908 (f) to suit his own interpretation. We also contended that although the deputy commissioner by his findings of fact stated that the injuries received by the claimant were not "previous disabilities within the meaning of section 908 (f) of the Act" that said section was the only section in the Act under which the claimant should have been rated on the theory that said section contained no verbiage to the effect that the previous disability mentioned in this section had to be one on which compensation or other recompense had to be paid, nor did the section contain any words showing that the term "injury" as related to previous injury meant "industrial injury" as was found by the deputy commissioner.

The United States Court of Appeals for the District of Columbia, by its majority decision, has affirmed the findings of fact of the deputy commissioner.

By way of explanation it might here be stated that funds which are provided in different State Compensation Laws for taking care of previous injuries suffered by a claimant prior to a compensable injury are given different names. Under the Longshoremen's and Harbor Workers' Compensation Act it will be noted that the fund is simply designated as "the special fund established under section 944". Some of the states call this fund "second injury fund". It will be noted in one of the decisions quoted herein that the fund is designated as "State One Percent Fund", apparently getting its name from the manner in which the funds were raised.

In interpreting the words injury and previous disability as used in section 908 (f) of the Act in different compensa-

tion acts in effect in the United States it seems to be the custom at the beginning of the different acts in question to define certain key words used, such as "employers", "Commission or Industrial Commission", "employee", "injury", "disability", etc. and when Congress passed the Longshoremen's and Harbor Workers' Compensation Act it defined these words.

However, in view of the reason for the insertion of section 908 (f) into the Act, as explained by quotations from the hearings set forth hereafter, it appears clear that the Committee having in mind the reason for the said section being inserted used the word "injury" and "previous disability" in its ordinary sense, and not in the sense that these words were defined under section 902 (2) and (10) of the Act. It is the contention of the petitioners that when this section was inserted Congress was interested in trying to take care of claimants under the Act who might have had permanent partial disabilities to certain parts of their body before they came to work for an employer, such as an eye out, or a leg or arm off, and if they received an additional permanent partial disability, which was added to their previous permanent partial disability making the claimant totally and permanently disabled, that the employer should only have to pay for the permanent partial disability suffered in his employment, and the difference between that and the total permanent disability should be paid for out of the "special fund" mentioned in section 944 of the Act. Bearing in mind the problem which Congress had before it how could this section have been worded better?

The special fund mentioned in Section 908 (f) of the Act, established in section 944, accumulates as the result of employers and insurance carriers paying $1,000.00 into the fund for the death of an employee where the deputy commissioner determines that there is no person entitled under the Act to compensation for such death. Said section 944 provides that fifty percentum of each such $1,000.00 pay-

ment shall be available for payments under the sub-division (f) of section 908, and fifty percentum shall be available for payments under sub-division (g) of section 908. All amounts collected as fines and penalties also go into this fund.

One of the methods of ascertaining the intention of Congress in regards to a specific piece of legislation is to look to the hearings held on the legislation.

The following discussions took place before the Committee on the Judiciary, House of Representatives, 69th Congress, First Session, on Senate Bill 3170 (which is the Longshoremen's and Harbor Workers' Compensation Act) June 29th, 1926 (Serial 16, part 2):

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Mr. Hinsley: In section 10, page 8 of the Cummins Act, there is a provision I want to discuss: that section is to take care of cases of this kind, we believe. Where an employee has but one eye, and during the course of his employment he loses the other eye, and then becomes permanently disabled; and the burden is not upon the employer to provide for permanent total disability. And the Act then provides a fund so that the Government may pay the difference between the disability that the employee sustained in the course of employment, and the permanent disability compensation. We believe that this payment of $1,000.00 as provided for in Section 45, on page 40—

The Chairman: (Interposing) Well, you say that, if he has lost one eye, and then subsequently, in the course of employment, loses the other eye, he would come under the provisions of this Section?

Mr. Hinsley: Yes, sir.

The Chairman: Well, is that not a little aside from what the section provides? The section provides that if he receives an injury, which of itself would result in partial disability, but which, when combined with an existing disability, either results in total disability or increases the degree of partial disability, and so on. Now, you are speaking of when he loses one eye and in the course of employment loses the other one, that

he should also be entitled to compensation for the second one. But this second applies only to where he is partially disabled, arising out of his employment, and has some existing disability at the time this partial disability arose.

Mr. Hinsley: Yes, then he becomes totally disabled.

The Chairman: Then he becomes totally disabled; and it provides that the employer shall not be liable for anything except the partial disability?

Mr. Hinsley: Yes, sir, that is correct.

The Chairman: And the remainder of the total disability is paid for out of another fund?

Mr. Hinsley: Yes, sir. And our objection is to this fund. This fund is created by assessing every employer $1,000.00 in certain death cases. We think that is a penalty upon the employer; because my Company might not have any men injured under this section; but they might have death cases. So I am paying $1,000.00 for the permanent disability of a man in another employment. Now, we do not object to taking care of men in that position; but we think funds should be provided out of the administration costs, spread out over the whole industry and not through the $1,000.00 fund in death cases. So section 45 is the section that we think should be eliminated.

The Chairman: But let us go one step further. Section 45 establishes a special fund. Now, the only provision regarding this is that it is the concurring result, partly from a disability received in employment, and partly from an existing disability, shall be paid out of this fund.

Mr. Hinsley: Yes, sir.

The Chairman: Now, your objection is to the manner in which this fund is raised, is it not?

Mr. Hinsley: Yes, sir.

The Chairman: Now, that does not apply to that section but it applies to the provisions of this section 45, which provides that an employer shall pay in certain costs?

Mr. Hinsley: Yes, sir.

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Mr. Montague: Let me see if I understand you. If you have no objection to the $1,000.00 going to persons who have sustained such additional injuries in their employment.

Mr. Hinsley: No, sir.

Mr. Montague: But you do object to the $1,000.00 fund created in this way being applied to those other cases?

Mr. Hinsley: No. We object to the manner of collecting the fund. We do not object to a man who had a previous injury and then went into the employ of a certain employer and sustained another injury so as to make him permanently disabled—for instance, if he had one eye, and then loses the other, we believe he should be taken care of. The employer, of course, does not contribute all of that.

Mr. Montague: I understand that.

Mr. Hinsley: But a portion of it is to come from a fund collected from employers in certain death cases and we object to one man paying $1,000.00 towards this fund which goes to the employee of another; but which should come from the entire industry.

Mr. Montague: I understand that."

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"In the Statement of John B. Andrews, Secretary of the American Association for Labor Legislation, who appeared before the Committee, recommending the passage of the Longshoremen's and Harbor Workers' Compensation Act, he stated with reference to cases under the Act where there had been a second injury:

'Now, the second injury case that has been discussed in these hearings from the beginning: The second injury proposition is as much to the advantage of the employer and his interest as it is for the benefit of the employee. It protects that employer who has hired, say a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with

> one eye from being denied employment on account of being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also * * *."

At this particular hearing Honorable George Graham presided as Chairman of the Judiciary Committee. These hearings can be found in bound volume entitled "Book 1, House Committee Hearings, Before Committee on Immigration, Naturalization and Insular Affairs, Interstate and Foreign Commerce, Irrigation and Reclamation, Judiciary, 1926, Volume 438. Subjects: Various—Senate Library".

In explanation it should be stated that Senator Albert B. Cummins, whose name is mentioned in the excerpts, was Chairman of the Sub-Committee of the Judiciary on Senate Bill 3170, which eventually became known as the Longshoremen's and Harbor Workers' Compensation Act. Reference in the hearings to the Cummins Bill refers to Senate Bill 3170, which eventually became law. The Cummins Act, which originated in the U. S. Senate was reported out by the Committee on the Judiciary, House of Representatives, 69th Congress, and Section 10, page 8 of the Cummins Act became Section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act as passed by Congress on March 4th, 1927.

In view of the fact that the above quoted excerpts from the hearings on the Compensation Act now before this Court shows the intent of Congress as relates to section 908 (f) of the Act, which is under scrutiny in the instant case, it is clear where a man lost an eye from a previous injury and went to work for an employer and then lost his other eye, Congress intended that the employer for whom the man was working at the time of the second injury should be responsible for compensation only for the loss of the second eye, and that the difference between that loss and total permanent disability for total blindness was to be paid for out of the special fund established by section 944

of the Act, and that this section clearly covers just such a case as the Court has before it in this instance.

Furthermore, it will be noted from the statement of Mr. Andrews, Secretary of the American Association for Labor Legislation, who appeared before the Committee, that the reason this provision was put in the Act was to protect an employer who hires a one-eyed workman where that workman loses his other eye and became totally disabled. This man, who apparently was appearing on behalf of legislation favorable to labor, specifically tells Congress that if an employer did not have a provision such as section 908 (f) in the Compensation Act the employer would have to pay total permanent disability compensation even though the man had a permanent partial disability at the time he came to work for the employer, and that by putting such a provision as section 908 (f) in the Longshoremen's and Harbor Workers' Compensation Act it protected the workman with one eye from being denied employment on account of his being an extra risk.

It is contended that the quotations from the hearings before the Committee makes it perfectly plain what Congress intended by this Section.

No mention was made in the Congressional hearings on the Bill that the word "injury" as used in section 908 (f) of the Act meant "industrial injury", nor that the words "previous disability" meant a "previous compensable disability."

It has been well said that the language of a statute is to be read in the ordinary sense of the words used, according to their grammatical arrangement; the Congress is to be credited with a knowledge of the meaning of the words and the rules of grammar; that the law is to be read prospectively, unless it compels the court to read it retrospectively; that the court is to add nothing to its scope as plainly worded; and these are all elementary rules of statutory construction where there is any necessity or room for construction, citing:

Denn v. *Reed*, 10 Peters 524; 9 L. Ed. 524.
Market v. *Hoffman*, 101 U. S. 112; 25 L. Ed. 782.
Lake County v. *Rollins*, 130 U. S. 662; 32 L. Ed. 1060.
U. S. v. *Goldenberg*, 168 U. S. 95; 42 L. Ed. 394.
Hamilton v. *Rathbone*, 175 U. S. 414; 44 L. Ed. 29.

In the case of *John Thornley, appellant* v. *U. S.*, 113 U. S. 310, 28 L. Ed. 99, the Supreme Court of the United States in passing upon the construction of a statute involving the longevity pay of a naval officer said:

> "Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no need for construction * * * Applying this rule we are of opinion that the case of the appellant finds no support in any act of Congress."

In the case of *St. Paul M. & M. R. Co.* v. *Phelps*, 137 U. S. 528, 530, 24 L. Ed. 767, the Supreme Court of the United States in interpreting an Act of Congress of 1857 granting lands to the territory of Minnesota to aid in the construction of railroads, said:

> "But where a statute, as in this case, is clear and free from all ambiguity we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government, even though it may be the settled practice of the department."

Chief Justice Groner in his dissenting opinion with reference to section 908 (f) of the Act in question (R. 64, 65) said:

> "* * * It seems to me clear that when Congress inserted the clause in question, its object and concern were to make an exception to the provisions of the Act which impose on the employer a fixed liability in all cases of industrial or occupational injury; and while securing full compensation to the injured by charging part of the cost to the special fund, to hold the employer responsible only for that part which arose out of the then employment. * * *"

> " • • • and it is not unreasonable, I think, to assume that Congress recognized that a one-legged man, a one-armed man, or a one-eyed man, whose disability may have existed for years, would have little chance in the ordinary labor market if the employer is forewarned that in the event of an injury, he would be faced with full liability. The facts of this case seem to me to emphasize the correctness of the reasoning, for it is most unlikely, every one will agree, that the injured man in this case, with only one leg and one arm, would ever have found a job if the employer knew that, in the event of a minor accident, liability would be calculated on the basis of both the new and the old. It seems therefore a fair conclusion that to avoid this discrimination in employment between an apparently sound and an obviously unsound man, Congress wrote in the exception and this, I think, is confirmed in a fair consideration of the evidence of the spokesman for labor at the Congressional hearings • • • "

This view is supported by different state courts in their interpretation of the second injury fund clause in their different Compensation Acts.

In the case of *Richardson* v. *Essex National Trunk & Bag Co., Inc., et al.,* decided by the Court of Errors and Appeals of New Jersey on September 22d, 1937, *194 A. 622, 119 N. J. L. 47*, that Court held that under their statute entitling compensation claimant to compensation for total and permanent disability, where caused by compensable accident following prior non-compensable accident, the employer was liable only for the second accident and the State "One Per Cent. Fund" was liable to the employee for the difference necessary to satisfy total and permanent disability suffered by him. In that case the Court said:

> "Thus the Legislature set out to, and did eliminate the employers' liability for an accident unrelated to the employment of the injured person. We discern in its legislation of 1936 a clear intent not to impose any greater obligation upon an employer who hires or employs a person previously injured than if he had hired a person not so injured. The language of the last

> stated Act fully supports our construction and application thereof. It provides (N. J. St. Annual 1936—Sec. * * * 236-93) that the State 'One Per Cent. Fund' shall make payments to 'cover that portion of the period for which the employer is not legally responsible due to the permanent and partial disability suffered or possessed by the employee at the time that the employee sustained the injury as a result of which employee became totally and permanently disabled'. This, to us, evinces a definite purpose to exclude liability for disabilities not flowing from the second accident. If it were otherwise, the whole philosophy upon which the State's plan is founded would crumble and fall; it would be rendered nugatory. This clearly was not the purpose of the Act of 1935."

In the case of *State ex rel Garwin* v. *District Court of Cass County, et al.*, 151 N. W. Rep. 910; 129 Minn. 156, decided by the Supreme Court of Minnesota on March 19th, 1915, the Supreme Court of Minnesota had before it a case somewhat similar to the one now before this Court, and involving a statute which is worded exactly the same as the statute in the instant case as regards previous injury or disability.

In this Minnesota case the claimant was totally blind in one eye, having lost the sight thereof by an accidental injury suffered some time prior to his employment with the respondent. This was considered a permanent partial disability within the State Compensation Statute. While engaged in work for respondent the claimant suffered another injury which totally destroyed the sight of his remaining eye, thus rendering him totally blind. Upon these facts the Trial Court awarded compensation under the Statute for a permanent partial disability, which was affirmed by the Supreme Court of Minnesota. Claimant contended before the Supreme Court on appeal that he had a permanent total disability resulting from the loss of both eyes and that he was entitled to compensation upon that basis. In this case the Court said:

"* * * No doubt in the enactment of the statute and in providing for relief in cases of this kind, the Legislature had in mind the fact that persons suffering from permanent partial disability would seek such employment as their remaining ability would fit them to discharge, and express provision was made in the statute to protect the employer from liability for injuries received by an employee before entering his service. To this end section 15 of the Act was incorporated therein. That section provides:

> 'If an employee receive an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury.''

The language of the statute is clear and unambiguous, and clearly was intended to limit the liability of the employer to compensation commensurate with the injury suffered by the employee while in his service and to relieve him from the consequences of injuries previously sustained even though both resulted in permanent total disability. From the viewpoint of the Legislature, and the fact that the liability created is founded upon no wrong of the employer, it would seem fairly clear that this limitation upon the liability was deliberately made, and founded in justice and fairness. The employer accepts in his service the disabled employee, knowing of the disability and with the knowledge that under the compensation statute he is liable for accidental injuries to such employee while engaged in his service, but to couple the prior disability with one suffered while in his service and make an employer liable for both, would seem a hardship the Legislature intended to avoid. At least we think the language of the statute clearly manifests that intention. The statute is too plain to admit any other view, and there is no room for judicial construction. While it is true that the combined injuries result in total disability, the statute declares that as to the last employer it shall be treated as a partial disability. That the Legislature had the right to so provide cannot well be questioned. And, though the statute is remedial in the broadest

sense of the term and to be liberally construed, the court is without power or authority to change the plain language thereof by construing it to mean the reverse of what is clearly stated therein * * *."

It will be noted that section 15 of the Minnesota Act mentioned in the above decision uses the exact language as is used in the first part of section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act involved in the instant case. The only difference is that beginning where the Minnesota Act ended Congress added thereto the proviso that in addition to compensation for such permanent partial disability the employee should be paid the remainder of the compensation that would be due for permanent total disability, such additional compensation to be paid out of the special fund established in section 944 of the Act, which section is previously set forth in this brief.

In the case of *Wheeling Metal & Mfg. Co.* v. *Workmen's Compensation Com'r*, 2 S. E. Rep. (2d) 252, 121 W. Va. 155, decided on March 21st, 1939 by the Supreme Court of Appeals of West Virginia, it was held that where an employee was entitled to a rating totalling permanent disability as the result of a prior non-compensable injury, not waived by him, and a subsequent compensable injury, the employer in whose service the subsequent injury was received should have been charged only with an amount equal to partial permanent disability attributable to the subsequent injury; and that the residue was to be paid from funds under the control of the Compensation Commissioner under the West Virginia Compensation Code of 1931, 23-2-4; Code 1937, 23-4-9b. In that case the claimant in 1912 while working for an employer received an injury which resulted in the amputation of his right forearm about two inches below the elbow. After recovery from the amputation he remained in the service of the same employer and in January, 1938 in the course of, and resulting from his employment, he received a severe injury to his left hand which

incapacitated the man from labor. In this case the court said:

> "We recognize fully that in statutory enactment or judicial decision it would have the effect of placing on employers of previously injured men a burden wholly disproportionate to the responsibility which attends the employment of unimpaired men, and would probably have the unfortunate result of deterring employers from taking into their employment men who had received bodily impairment. Such consequences would, of course, create a grievous situation. However, in this State in both enactment and decision an effort has been made to guard against creating a condition which would permit employers to discriminate against employees who had suffered some physical impairment.

In the case of *Marker* v. *Industrial Commission*, 37 Pac. 785, 84 Utah 587, decided November 19th, 1934, the Supreme Court of Utah had before it a compensation claim involving a workman who had lost industrial vision of his right eye in 1903 in a foreign jurisdiction long before Utah had passed a compensation act. In 1929 the claimant sustained the loss of his left leg below the knee for which he was paid compensation. He claimed compensation for permanent and total disability and claimed the loss of the eye should be paid out of the second injury fund under the Utah Act. The Industrial Commission of Utah rejected the claim on the theory that the man had not completely lost the vision of his right eye and that the injury having occurred before the passage of the Utah Compensation Act it was not retroactive. The Court in reversing the Ind. Comm. held the claimant entitled to receive benefits under the special fund for the first eye injury as the employer had fully discharged all of its obligations under the law for the second injury:

The Court said:

> "Subdivision 6 of Section 3140 Compensation Laws Utah 1917 as amended (R. S. 1933, 42-1-65), provides for compensation to be paid because of a condition of disability created subsequent to the date of the act by

reason of a subsequent partial disability combined with a previous partial disability. It is the condition of the employee resulting because of a subsequent injury that is to be compensated. The statutory language is broad and sweeping in its scope. The word "previously" is used without limitation or condition. This word is defined in Webster's New International Dictionary as "beforehand; antecedently", and "previous" is defined as going before in time; being or happening before something else; antecedent; prior". The Legislature saw fit to use the word without limitation as to time. We must conclude, therefore, that the disability referred to is one that had been incurred at any time previous to the subsequent partial disability. The Legislature having imposed no limitation or condition as to time or place of the incurring of the previous disability we know of no rule of law which requires or permits us to do so by way of construction. The Legislature undoubtedly intended as is conceded by the Attorney General, to provide protection for men who had already been partially permanently disabled, but yet were able to do work. * * * Without some provision of this kind, employers would be extremely hesitant in employing men partially disabled, since an injury resulting in partial permanent disability of the employee might well impose greater liability on the employer than a similar injury incurred by a person not previously disabled. The legislative intent is fully met only when the words 'previously incurred' are construed to refer to disability incurred at any time previous to the subsequent disability and to include cases of permanent partial disability incurred before as well as after, the effective date of the act. To this extent the provision operates retrospectively by legislative intent clearly expressed."

In the case of *Panther Creek Mines, Inc.* v. *Industrial Commission*, 342 Ill. 68; 173 N. E. 818, the Supreme Court of Illinois had before it for interpretation the Illinois Compensation Statute (Cahill's Rev. Stat. 1927, Chapter 48, paragraph 208) which among other provisions said:

> "* * * Provided further that any employee who has in a previous and independent accident suffered the loss or permanent and complete loss of the use of any one of said members, and in a subsequent independent accident loses another or suffers the permanent and complete loss of the use of any one of said members, the employer for whom the injured employee is working at the time of said last independent accident shall be liable to pay compensation only for the loss or permanent and complete loss of the use of the member occasioned by said last independent accident."

The claimant in this case had previously lost an eye and subsequently had lost his remaining eye. The sole question was to determine the last employer's liability and whether claimant was entitled to come under the second injury fund. The Court held that the second employer's liability was only for the loss of the remaining eye, plus temporary total incapacity, and that the payment from the fund was to start after payments for temporary total and permanent ceased.

In the majority opinion of the court in the instant case it is stated that petitioners' construction of the words involved in section 908 (f) would defeat not only the letter of the statute but its purpose, and asserting that the special fund established by section 944 of the Compensation Act is a small fund and it would soon be exhausted if it were to be drawn upon in every case in which a total disability results from the combination of an "injury" with previous defect or incapacity, and there would then be no way of paying the claims which Congress intended should be paid out of this fund (R. 62). No better answer to this statement of the court in its majority opinion can be made than the dissenting opinion of Chief Justice Groner (R. 64, 65) wherein he states:

> "It is accordingly, I think, clearly incorrect to argue, as the Board does, that by construing the term 'disability' in its ordinary sense, the effect would be to bring within the exception clause cases of injury from weak heart, diseased back, congenital deformity and such like afflictions. For, as was said by the New York

> Court of Appeals, and as has been said by us, and indeed by practically all of the circuits, weakness, whether pathological or traumatic, which does not become manifest until a subsequent accident, is not ordinarily thought of as prior disability under any provision of the Act. And this generally accepted view is borne out by the great volume of decisions holding that a subjective ailment, as a diseased heart, a diseased kidney, or a congenital deformity, or a pathological condition contributing to an injury or a death, does not relieve the employer from the obligation of total indemnity." * * *

Numerous Federal cases are cited by Chief Justice Groner in support of the above mentioned statement, which are found on the bottom of page 65 of the record in this case.

The statement by the court in its majority opinion tha. the fund established by Section 944 of the Act is a small fund which would soon be exhausted if it were to be drawn upon in this particular type of case is questioned by your petitioners. There is no evidence in the record in this case that this fund is a small fund. It is petitioners' understanding that there are two funds under section 944 of the Longshoremen's and Harbor Workers' Compensation Act; one fund results from the accumulation of the $1,000.00 payments made into the fund and fines and penalties under the Act as made applicable to the District of Columbia, and the other fund is the national fund collected outside of the District of Columbia from the same source under section 944 of the Act.

At the time Congress passed the Longshoremen's and Harbor Workers' Compensation Act in 1927 it probably had no guide to use when it established the fund under section 944 (a) (c) (1) (2). Whether the fund would be sufficient for the purpose of the Act by the payments which were to be made into it very likely was unknown to Congress. Congress had no statistical table to show how this section of the act would function, or whether the sums rea-

lized from the $1,000.00 payments and other receipts would be sufficient to maintain the fund. If the fund became depleted there was no reason why Congress could not increase the payments into the fund by amending the Act. There is nothing in the record in this case to show that the funds provided under section 944 of the Act would be exhausted if section 908 (f) of the Act was construed as petitioners claim it should be construed.

CONCLUSION.

It is petitioners' contention that the deputy commissioner having erred in his findings of fact and award in this case the United States Court of Appeals for the District of Columbia in its decision should have reversed the decision of the District Court of the United States for the District of Columbia in its order dismissing the bill of complaint filed by the petitioners, and required the deputy commissioner to vacate and set aside the findings of fact and award made in this case, and that the case should have been remanded to the deputy commissioner with instructions to rate the case under the provisions of section 908 (f) of the Compensation Act.

Petitioners believe that the intent of Congress at the time the Compensation Act in question was passed is clearly shown from the excerpts of the Hearings quoted herein and that section 908 (f) was an exception to the rest of the Compensation Law and was placed therein so that employees having lost eyes, arms or legs as the result of previous accidental injuries could be employed by employers without their being held liable for the previous injuries if the employees in question received further permanent partial disabilities while in the employment.

Respectfully submitted,

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